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February 8, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

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Case Number: TSO-0142

This Decision concerns the eligibility of XXXXXXXXXXXXXXXX (hereinafter the individual) to hold an access authorization.¹ The regulations governing the individual's eligibility are set forth at 10 C.F.R. Part 710, "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." This Decision will consider whether, based on testimony and other evidence presented in this proceeding, the individual should be granted access authorization. As discussed below, I find that the individual has not met his burden to bring forward sufficient evidence to show that access authorization should be granted.

I. History

This administrative review proceeding began with the issuance of a Notification Letter, informing the individual that information in the possession of the DOE created substantial doubt pertaining to his eligibility for an access authorization. In accordance with 10 C.F.R. § 710.21, the Notification Letter included a detailed statement of the derogatory information.

Specifically, the Notification Letter indicated that a DOE consultant psychiatrist (hereinafter also referred to as consultant psychiatrist) diagnosed the individual as alcohol dependent in sustained partial remission, without evidence of rehabilitation or reformation. This diagnosis was set forth in the consultant psychiatrist's report dated October 6, 2003. The Notification

1/ An access authorization is an administrative determination that an individual is eligible for access to classified matter or special nuclear material. 10 C.F.R. § 710.5.

Letter also referred to DWI citations issued to the individual in 1987, 1989, and 1991; and alcohol-related arrests in 1989 involving disorderly conduct and open alcoholic beverage container in a motor vehicle. According to the Notification Letter this raises security concerns under 10 C.F.R. §710.8 (h) and (j)(Criterion H and Criterion J). ² Other incidents cited in the Notification Letter, which also involve alcohol use, include the individual's arrest for felony burglary in 1980, and his being struck by an automobile in 1989 while he was an intoxicated pedestrian. The Notification Letter also cites two other automobile accidents, one in the 1970s and the other in 1989, in which the individual was intoxicated. According to the Notification Letter, these events raise a security concern under 10 C.F.R. §710.8(1)(Criterion L). ³ It is the individual's burden in this proceeding to show that he has resolved the security concerns related to his use of alcohol.

The Notification Letter informed the individual that he was entitled to a hearing before a Hearing Officer in order to respond to the information contained in that letter. The individual requested a hearing, and that request was forwarded by the DOE Office to the Office of Hearings and Appeals (OHA). I was appointed the Hearing Officer in this matter. In accordance with 10 C.F.R. § 710.25(e) and (g), the hearing was convened.

At the hearing, the individual was represented by an attorney. The individual testified on his own behalf, and presented the testimony of a psychiatrist who evaluated him for the purposes of this administrative proceeding (individual's psychiatrist); his wife; the president of the company for which he works; two co-workers and

2/ Criterion H relates to a mental condition which, in the opinion of a psychiatrist causes or may cause a significant defect in judgment or reliability. Criterion J relates to habitual use of alcohol to excess or to a diagnosis by a psychiatrist that an individual is suffering from alcohol abuse or dependence.

3/ Criterion L relates to unusual conduct or circumstances showing that an individual is not honest, reliable or trustworthy.

a relative by marriage. The DOE Counsel presented the testimony of the DOE consultant psychiatrist.

II. Hearing Testimony

A. The DOE Consultant Psychiatrist

The DOE consultant psychiatrist reiterated the diagnosis that he reached in his October 2003 report that in the 1970s and 1990s this individual was alcohol dependent. This was manifested by: (i) his alcohol tolerance, (ii) his persistent efforts to control alcohol use, (iii) occupational or social activities given up or reduced because of alcohol use, and (iv) persistent physical problems associated with alcohol use. The consultant psychiatrist further discussed his view that the individual was alcohol dependent, in sustained partial remission. This diagnosis is based upon his judgment that at the time of the evaluation, the individual did not meet all of the criteria necessary under the DSM-IV for alcohol dependence, but did meet Criterion 4, which is that he is "trying to cut down and stop alcohol use." Further, as of the date of the evaluation, the psychiatrist did not believe that the individual had demonstrated reformation/rehabilitation. He stated that adequate evidence of reformation/rehabilitation would be that the risk of relapse in the next 5 years is low: about 10 percent. The DOE consultant psychiatrist also described in detail the types of programs that he believes are necessary for this individual in order to establish reformation and or rehabilitation. According to the DOE consultant psychiatrist, a key aspect of reformation and rehabilitation for this individual is complete abstinence from alcohol for a minimum of two years.⁴ Since the individual is admittedly continuing to use alcohol, the DOE consultant psychiatrist did not find that rehabilitation/reformation had taken place. Transcript of Personnel Security Hearing (Tr.) at 19-23. In this regard, based on the individual's own statement that he consumes up to 12 beers on the weekend, the DOE consultant psychiatrist testified that the individual has already relapsed. Tr. at 158. The consultant psychiatrist believed that the individual has resumed using alcohol habitually to excess. Tr. at 153. He further believes that the individual's use of alcohol in and of itself represents poor judgment, and also that while the individual is using alcohol he is capable of exhibiting bad

⁴/ Other aspects of a rehabilitation plan for this individual include participating in a program such as Alcoholics Anonymous (AA) or another professionally led substance abuse program. Tr. at 22.

judgment because he may unintentionally make remarks about sensitive subjects involving classified matters. Tr. at 144, 153.

B. The Individual's Psychiatrist

The individual's psychiatrist had a somewhat different view of the individual's alcohol use pattern. He believed that the individual suffered from alcohol abuse, and is now in partial remission. Tr. at 133. He was not fully persuaded that the individual was alcohol dependent in the past because in his opinion the individual did not exhibit signs of withdrawal or tolerance. Tr. at 133, 170. Nevertheless, he could not rule out that this individual was, in the past, alcohol dependent. Tr. at 134. It was his view that the individual's continued consumption of alcohol did not create a concern because the use was "a-symptomatic." That is, the individual was not demonstrating the symptoms of alcohol abuse or dependence, such as "getting in trouble with the law. . . or having marital problems related to alcohol. . . [or] having work problems. They're basically drinking, and it's not causing symptoms." Tr. at 135. He believed that this change in the individual's behavior is due in part to the individual's commitment to his wife, family and work, and that these personal factors will significantly improve the potential for a favorable outcome for this individual. Tr. at 141,142,143. He believed that the individual is trying to control when and where he drinks alcohol. Tr. at 144. This witness believed that it was more likely than not that the individual could continue to use alcohol in a responsible manner, but admitted "the risk is there" for exercise of bad judgment if he uses alcohol to excess. Tr. at 147-50.

C. The Individual

The individual admitted that excessive alcohol use had created a problem for him in the past, but he testified that he is not using alcohol excessively at this time. Tr. at 107. He does not believe that excessive use of alcohol is a problem for him. Tr. at 117. He testified that he will typically drink a six pack of beer during a weekend, but also testified that he may consume the entire amount in an afternoon. Tr. at 109. He believes that now that he has a wife and family, he has the life-style he has been seeking and there is no need for him to binge on alcohol. Tr. at 119.

D. The Wife

The individual's wife stated that she has known the individual for 13 years and that they were married in 1998. She testified that she has never seen the individual "drunk and out of hand." She indicated that the individual consumes a six-pack of beer over a weekend, and that sometimes he may consume four or five beers over a six or seven hour period. Tr. at 95. Although this witness stated that at the time of the hearing she did not see a problem with the individual's alcohol consumption, she also stated that sometimes the individual "drinks more than he should." Tr. at 96, 98. She further testified that she reminds him to stop drinking when he has more than five or six beers. Tr. at 97.

E. Colleagues and Relative

The president of the company for which the individual works testified that he has known the individual for about two years, and that he interacts with him many times a week and has never seen in him any signs of an alcohol problem. According to this witness, the individual has had no unusual absenteeism and has been a trustworthy employee who uses good judgment. Tr. at 57, 58, 65. He does not see the individual outside of the workplace, except for company social functions. On those occasions, he has seen no problem with the individual's use of alcohol. Tr. at 58. Two co-workers of the individual also indicated that they have known him for about two years and he is a reliable employee with good judgment. They saw no signs of an alcohol problem in his behavior. Tr. at 70-74; 78-80. A relative by marriage of the individual testified that he has known the individual for about ten years and that he sees the individual about ten times a year at family celebrations. He stated that he shares a six-pack of beer with the individual and that the individual usually drinks about two of the six beers over two or three hours. The witness testified that he has never seen signs of abuse or overuse of alcohol in the individual. Tr. at 84-87.

III. Standard of Review

A DOE administrative review proceeding under 10 C.F.R. Part 710 is not a criminal case, in which the burden is on the government to prove the defendant guilty beyond a reasonable doubt. In this type of case, we apply a different standard, which is designed to protect national security interests. A hearing is "for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization." 10 C.F.R. § 710.21(b)(6).

The burden is on the individual to come forward at the hearing with evidence to convince the DOE that granting or restoring his access authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.27(d).

This standard implies that there is a strong presumption against the granting or restoring of a security clearance. See Dep't of Navy v. Egan, 484 U.S. 518, 531 (1988) ("the clearly consistent with the interests of the national security test" for the granting of security clearances indicates "that security-clearance determinations should err, if they must, on the side of denials"); Dorfmont v. Brown, 913 F.2d 1399, 1403 (9th Cir. 1990)(strong presumption against the issuance of a security clearance). Consequently, it is necessary and appropriate to place the burden of persuasion on the individual in cases involving national security issues. Personnel Security Hearing (Case No. VSO-0002), 24 DOE ¶ 82,752 at 85,511 (1995).

Once a security concern has been found to exist, the individual has the burden of going forward with evidence to rebut, refute, explain, extenuate or mitigate the allegations. Personnel Security Hearing (VSO-0005), 24 DOE ¶ 82,753 (1995), aff'd, 25 DOE ¶ 83,013 (1995). See also 10 C.F.R. § 710.7(c).

IV. Analysis

As is evident from the description of the testimony of the two psychiatrists, they do not see eye-to-eye on the diagnosis. The DOE consultant psychiatrist believes that the individual is alcohol dependent and, given his present pattern of drinking to excess, is currently in relapse. The individual's psychiatrist believes the individual was an abuser of alcohol who is currently an "a-symptomatic" user, but thinks he may have been alcohol dependent in the past. The individual's psychiatrist did not believe there was a high probability of a lack of judgment in this case, although he would not quantify what he meant by "high probability." He suggested that it was more likely than not that there would not be a judgment problem. The consultant psychiatrist pointed out that the individual admitted that he "tends to be more talkative" when he uses alcohol. From this, the consultant psychiatrist concluded that there is a readily discernible risk of lack of judgment if this individual uses alcohol.

Overall, I find the DOE consultant psychiatrist's evaluation to be more persuasive. First, I was convinced that this individual is,

as the consultant psychiatrist believes, an alcohol dependent who has relapsed from his partial remission status. In his evaluation, the DOE consultant psychiatrist provided a highly detailed explanation of the basis for his diagnosis of alcohol dependence. He cited precisely which of the criteria set forth in the *Diagnostic and Statistical Manual-IV-TR (DSM)* the individual had met, and in what time frames he met them. *Evaluation* at 23-24. See also Tr. at 19-20. I found this specificity to increase the overall persuasiveness of the consultant psychiatrist's opinion.

On the other hand, the individual's psychiatrist's diagnosis of this individual as an "alcohol abuser" was not convincing. Although he cited the *DSM* criteria under which this individual could have been considered an abuser of alcohol, the individual's psychiatrist did not adequately explain why the individual did not meet the criteria for alcohol dependence as outlined by the DOE psychiatrist.⁵ Moreover, the individual's psychiatrist testified that at times this individual was perhaps alcohol dependent, and this psychiatrist could not rule out alcohol dependence as a diagnosis. Tr. at 134. I find this more uncertain testimony to be less convincing than that of the DOE consultant psychiatrist.

I am also not convinced by the view of the individual's psychiatrist that the individual's purported "a-symptomatic" alcohol use establishes that this individual is able to use alcohol without risk of bad judgment. First, I am not persuaded that the individual's alcohol pattern at this point is truly a-symptomatic. The individual indicates that his wife continues to express concern and dissatisfaction about his drinking. Tr. at 113. The wife's testimony confirms this. Tr. at 93,94,95,96,97. Further, the individual admitted to the DOE consultant psychiatrist that in the year 2001 he drove while intoxicated, although he did not suffer any legal consequences. These two factors contradict the opinion of the individual's psychiatrist that the individual is able to use alcohol a-symptomatically. In fact, the individual's psychiatrist admitted that, given these two factors of which he was previously unaware, he was less convinced about his belief that a-symptomatic alcohol use was appropriate for this individual. Tr. at 172.

I also believe that at this time the individual has returned to use of alcohol habitually to excess. Although he stated at one point during the hearing that a six-pack of beer lasts him two weekends,

5/ As noted in the *DSM* and by the DOE consultant psychiatrist, in order to meet the criteria for alcohol abuse, an individual must never have met the criteria for substance dependence for this class of substance. *DSM* Criteria for Substance Abuse (B).

he also testified that he drinks six beers in an afternoon. Tr. at 109, 119. The individual's psychiatrist testified that the individual told him he drinks six beers about two to three times a month. Tr. at 144. The record also indicates that several days before an August 2003 personnel security interview he drank "six beers, seven, eight beers at a triple birthday party," and was intoxicated. Transcript of Personnel Security Interview at 24. The DOE consultant psychiatrist believed that the higher levels of alcohol use reported by the individual are "excessive." Tr. at 143. In a more guarded manner, the individual's psychiatrist testified, "I can see where somebody would say that's drinking excessively." Tr. at 144.

The individual seems to argue that even if he is using alcohol habitually at the stated levels, that there is no cause for a security concern with respect to this behavior because he would not reveal any classified information. In this regard, he contends that the security risks associated with his use of alcohol at the current level are no greater than that of the general population. As a general rule, if an individual is an alcohol abuser, alcohol dependent or uses alcohol habitually to excess, this in and of itself creates a security concern under Criterion J. The most common way for the holder of or applicant for access authorization to mitigate the concern is to demonstrate reform and/or rehabilitation. I recognize that it is theoretically possible to mitigate security concerns associated with excessive use of alcohol by demonstrating that such continued use "will not endanger the common defense and security and will be clearly consistent with the national interest." 10 C.F.R. § 710.27. In my opinion, such an unusual approach is especially difficult to maintain. In any event, the individual in this case has certainly not demonstrated that this is the case with respect to his own pattern. The individual has failed to provide any support for the position that he is able to use alcohol habitually to excess with no undue security risk. In fact, the record here indicates a real potential for exercise of bad judgment by this individual when he is intoxicated. The individual testified that he tends to talk excessively when he uses alcohol. Tr. at 111. The DOE consultant psychiatrist therefore believed that there is a risk of bad judgment by this individual when he uses alcohol because he becomes more talkative. Tr. at 153. In this regard, the individual's psychiatrist also expressed some concerns about the individual's judgment when he is intoxicated. Tr. at 147-50. Thus, I reject

the argument that this individual has demonstrated that he is able to consume alcohol without causing a security concern.⁶

I therefore find that this individual was alcohol dependent, has now relapsed, and is currently using alcohol habitually to excess. He has not shown that there is no undue security risk associated with his use of alcohol. He has therefore not resolved the Criterion J concerns raised in the notification letter. For these same reasons, I find that the individual has not resolved the related Criterion H and L security concerns.

As a final matter, the individual's attorney raised three points at the hearing which merit my attention. Tr. at 174. None of these arguments in any way changes the outcome in this case.

First, the individual's attorney suggested that after the DOE consultant psychiatrist performs his evaluation for the DOE, he has an obligation to follow up and see whether any of his predictive assessments had come to pass. Tr. at 33, 175. This is simply incorrect. A DOE consultant psychiatrist is asked by the DOE to interview an individual and provide an evaluation at a particular time. He does not treat the individual, nor is he expected to provide a follow-up analysis unless the DOE has asked him to do so. Rather, it is the individual who is expected to come forward at the hearing with any additional facts to mitigate or explain any derogatory conclusions expressed in the DOE consultant psychiatrist's evaluation. The DOE consultant psychiatrist is then able to modify his opinion based on the new information. Tr. at 33-34. *Personnel Security Hearing* (Case No. TSO-0090), 29 DOE ¶ 82,761 (2004).

The individual's attorney also pointed out that the individual has never consumed any alcohol while holding a clearance, nor is there any evidence that the individual has ever made any improper revelations resulting from or associated with excessive use of alcohol. These points do not carry the day in this case. In considering whether to grant or restore access authorization, the DOE is not required to wait until a candidate for the clearance has actually acted improperly or has compromised national security in order to deny or revoke access authorization. Such an approach

6/ I recognize that the individual's character witnesses, his colleagues and relative by marriage, offered support for the view that the individual consumes alcohol responsibly. I do not believe their testimony overcomes that of the consultant psychiatrist, or even the more wavering testimony of the individual's psychiatrist.

would not be sensible. *Personnel Security Hearing* (Case No. VSO-0227), 27 DOE ¶ 82,798 at 85,798 (1999).

Finally, the individual's attorney argues that the individual should be granted access authorization if he demonstrates that he has reduced his level of security risk to that of the general population at his work site. I need not determine at this point whether such a standard is appropriate. Suffice it to say, as I discussed above, the record in this case indicates that the individual is currently using alcohol habitually to excess, and he has not shown that there is no undue security risk associated with that behavior. It is therefore obvious that he has not mitigated the Criterion J security concern.

V. CONCLUSION

As the foregoing indicates, I am not persuaded that the individual has resolved the security concerns under 10 C.F.R. § 710.8 (h), (j) and (l). It is therefore my decision that access authorization should not be granted.

The parties may seek review of this Decision by an Appeal Panel under the regulation set forth at 10 C.F.R. § 710.28.

Virginia A. Lipton
Hearing Officer
Office of Hearings and Appeals

Date: February 8, 2005